IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1290 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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CHAUDHARY POPATBHAI SHANKARBHAI & 1 - Appellants
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR AD SHAH for Appellants.
MR KT DAVE, APP for Opponent.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA

	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/03/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellants – original accused Nos. 1 & 2 have filed this appeal under Section 374 (2) of the Code of Criminal Procedure (for short 'Code') against the judgment and order of the conviction and sentence dated 10.06.2005 passed by the learned Principal Sessions Judge, Mehsana in Sessions Case No. 245 of 2004 & Sessions Case No. 54 of 2005 whereby the appellants were convicted for an offence punishable under Section 304 (1) read with Section 34 of IPC and sentenced them to undergo R.I. for 10 years and to pay fine of Rs.20,000/- and in default of payment of fine, to undergo S.I. for a period of six months. The learned Sessions Judge has also convicted them for the offence punishable under Section 326 read with Section 34 of IPC and sentenced them to undergo R.I. for five years and to pay fine of Rs.10,000/- and in default of payment, to undergo S.I. for a period of two months. The learned Sessions Judge has further convicted them for the offence punishable under Section

324 read with Section 34 of IPC and sentenced them to undergo R.I. for one year and to pay fine of Rs.10,000/- and in default thereof, to undergo S.I. for 15 days. The learned Principal Sessions Judge has also passed an order that the accused Nos. 1 & 2 shall pay a sum of Rs. 5 Lac each as special compensation to the widow and the children of the deceased. The learned Sessions Judge has, however, acquitted the appellants – accused Nos. 1 & 2 from the charge of offence punishable under Section 147, 148, 149, 307 & 120-B of IPC. The other three accused have been acquitted from all the offences punishable under Sections 147, 148, 149, 302, 324, 326, 307 & 120-B of IPC.

2. The brief facts as disclosed in the complaint and unfolded during the trial are as under :-

3. That on 12.08.2004, at about 07.30 p.m., the complainant, namely, Amratbhai Malabhai Rabari was at his home. Popatbhai Shankarbhai Chaudhary, Sarpanch of Gadha village and his brother Chaudhary Babubhai Shankarbhai and other four persons came in a Jeep.

They stopped the said Jeep on the road in Rabarivas, Kansara Kui and Chaudhary Popatbhai Shankarbhai and his brother Chaudhary Babubhai Shankarbhai and other four persons came to his house and told him to come out and on being asked as to why he should come out, he was told that he has grazed his cattle (Bhelan) in the grass of wasteland. The complainant told him that he did not go there. Upon giving such reply, said persons got angry and meanwhile, Rabari Babubhai Malabhai, Rabari Bhikhabhai Malabhai, Rabari Dharmashibhai Khodabhai, Rabari Vishnubhai Amratbhai and Rabari Motibhai Odharbhai, etc. came there. As hot discussion started, the complainant went inside in his house to bring a stick and came out. At that time, out of the said persons, Chaudhary Popatbhai Shankarbhai gave a knife blow on the chest of Rabari Motibhai Odharbhai and Chaudhary Babubhai Shankarbhai gave a knife blow on the left part of the chest of Rabari Bhikhabhai Malabhai. Moreover, Sarpanch – Chaudhary Popatbhai Shankarbhai started wielding knife in excitement and gave a knife blow on the left side of the navel of Rabari Babubhai Malabhai. Moreover, the said Chaudhary Popatbhai Shankarbhai also gave a knife blow on the left

side of chest below arm pit of Rabari Dharamshibhai khodabhai. Moreover, said Chaudhary Popatbhai gave a knife blow between chest and belly of Rabari Vishnubhai Amratbhai standing nearby. Meanwhile, said Chaudhary Popatbhai Shankarbhai, while wielding knife in his hand, also gave knife blow below the navel on the belly of Thakor Mahendraji Nathaji of his village who was passing from the said place. Moreover, the other four persons accompanying in the jeep were also having knives.

4. Meanwhile, as Rabari Bhagwanbhai Odharbhai and Rabari Baldevbhai Mahadevbhai and others of his Moholla came there due to shouting during the said incident, cross fighting started in which Chaudhary Popatbhai Shankarbhai was also injured and thereafter leaving the said jeep, all the aforesaid persons ran away. The complainant did not see number of the said jeep. Since the family members of the complainant sustained fatal injuries, they were brought to Civil Hospital, Mehsana for treatment in Metador-407 of Raval Mathurbhai Chhaganbhai. Thakor Amratji Bhemaji Rabari Lagdhirbhai Gandabhai, Rabari Naranbhai

Malabhai and the complainant accompanied them. Thereafter, Rabari Motibhai Odharbhai, cousin brother of the complainant who sustained fatal injuries was brought to Doctor House for further treatment upon being advised by the Doctor of Civil Hospital, Mehsana. The treatment of rest of the persons was going on and Rabari Motibhai Odharbhai, who sustained serious injuries, died in Doctor House during treatment and the remaining injured persons, namely, complainant's son Vishnubhai, his cousin brothers and Thakor Mahendraji of his village were under treatment and they were totally conscious. During the said quarrel, the complainant has not received any injury but he has witnessed the incident with his own eyes. The said incident occurred in his Moholla at about 7.30 evening. There was no quarrel occurred with the Chaudharies of Gadha village earlier and there was no vendetta with them. However, since they came in a jeep in his Mohalla and suddenly attacked and killed Rabari Motibhai Odharbhai by causing injuries over the dispute of cattle grazing (bhelan), he requested to initiate legal proceedings in accordance with law against them for the said incident.

5. After filing of the complaint on 12.08.2004 with Visnagar Police Station, investigation was put into motion. During the course of investigation, statements of witnesses were recorded. Panchnama of the scene of offence was drawn. The accused were arrested and panchnama of their body was also drawn. Muddamal articles were collected and sent for chemical analysis. Post-mortem note of the deceased was also obtained. After investigation and on receipt of the FSL Report, since sufficient incriminating material was available against the accused, charge-sheet was filed against the accused in the Court of learned Judicial Magistrate First Class, Visnagar and as the offence punishable under Section 302 of IPC read with Section 114 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Visnagar committed the case to the Court of Sessions at Mehsana under Section 209 of the Code.

6. The learned Sessions Judge, Mehsana to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 147, 148, 149, 302, 324, 326, 307 & 120-B of IPC which was read over and explained to them. As the

accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Sessions Case Nos. 245 of 2004 & 54 of 2005.

7. It is pertinent to note here that appellant – accused No. 1 has also filed a cross complaint for the same incident on 23.08.2004 before the Visnagar Police Station being I C.R. No. 304 of 2004 for the offences punishable under Section 324 & 114 of IPC against four accused, who are the alleged injured witnesses in the present case. The learned Principal Sessions Judge, Mehsana has tried both the cases together and one Rabari Amratbhai Malabhai - the complainant in the present case, has been convicted by judgment and order dated 10.06.2005 for an offence punishable under Section 323 of IPC and was sentenced to undergo RI for one year with fine of Rs.10,000/- and in default, to undergo SI of two months. The other three accused have been acquitted from all charges.

8. As far as the present case being Sessions Case Nos.245 of 2004 & 54 of 2005 are concerned, to prove the culpability of the accused, prosecution has in all

examined as many as 11 witnesses, details of which are given in paragraph 5 of the judgment and they are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	22	P.W. 1 - Dr. Prakashbhai Pravinbhai Patva	119-125
02.	34	P.W. 2 – Amratbhai Malabhai – Complainant.	139-144
03.	36	P.W. 3 - Bhikhabhai Malabhai Rabari	147-150
04.	38	P.W. 4 - Babubhai Malabhai Rabari	153-155
05.	39	P.W. 5 – Dharamsinhbhai Khodabhai Rabari	156-158
06.	40	P.W. 6 – Vishnubhai Amratbhai Rabari	159-161
07.	41	P.W. 7 – Mahenderji Nathaji Thakore	162-163
08.	42	P.W. 8 – Amratji Bhemaji	164-165
09.	44	P.W. 9 – Vishnubhai Naranbhai	169
10.	48	P.W. 10 – Bharatsinh Gambhirsinh Vaghela	177-178
11.	49	P.W. 11 – Dolajibhai Savjibhai Asari	179-184

9. To prove the case against the accused, the prosecution has also produced and relied upon number of documents, details of which are given in paragraph 6 of the impugned judgment and order and the same are as

under :-

Sr. No.	Exh. No.	Particulars	Page No.
01.	23	Medical Certificate of Babubhai Malabhai Rabari.	126
02.	24	Medical Certificate of Bhikhabhai Malabhai Rabari.	127
03.	25	Medical Certificate of Dhamshibhai Khodabhai Rabari.	128
04.	26	Medical Certificate of Vishnubhai Amratbhai Rabari.	129
05.	27	Medical Certificate of Motibhai Odharbhai Rabari.	130
06.	28	Medical Certificate of Mahendraji Nathaji.	131
07.	29	P.M. Report of Motibhai Odharbhai.	132
08.	30	Certificate of cause of death	136
09.	31	Medical certificate of accused Popatbhai Shankarbhai Chaudhary.	137
10.	35	Complaint	145
11.	37	Charge-sheet for offences under Section 161 & 162 of the Gujarat Panchayats Act.	151
12.	43	Panchnama of scene of offence.	166-168
13.	45	Seizure of clothes of accused Popatbhai.	170-171
14.	46	Seizure of clothes of accused Babubhai.	172-173

Sr. No.	Exh. No.	Particulars	Page No.
15.	47	Discovery of knives by accused Chaudhary Babubhai Shankerbhai.	174-176
16.	50	Inquest report of Motibhai Audharbhai.	185-186
17.	51	Seizure of bloodstained clothes of injured witnesses.	187-189
18.	52	Forwarding letter to FSL.	190-193
19.	53	Letter from FSL to I.O.	194-206

10. After recording of the evidence of the prosecution witnesses was over, the learned Principal Sessions Judge, Mehsana explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated in the case. However, they have neither led any evidence nor examined any witness to support their defence.

11. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Principal Sessions Judge, Mehsana has held the

appellants – original accused Nos. 1 & 2 guilty and passed an order of conviction and sentence against them to which reference is made in earlier paragraph of this judgment, giving rise to the present appeal.

12. Mr. A. D. Shah, learned advocate appearing for the appellants has submitted that the impugned judgment and order of conviction and sentence passed by the learned Principal Sessions Judge, Mehsana is contrary to law, against the express provision of the statute and against the evidence on record. He has further submitted that the prosecution has failed to prove beyond reasonable doubt that the death of Motibhai Ogharbhai Rabari, the deceased, was culpable homicide amounting to murder. The prosecution has failed to prove beyond reasonable doubt that the appellants – accused Nos. 1 & 2 had inflicted knife blows on the deceased on 12.08.2004 at Kansara Kui village at about 7.30 p.m. with the intention and knowledge of causing death, or of causing such bodily injury as was likely to cause death of the deceased and for committing this, the appellants – accused Nos. 1 & 2 had abetted with each other and, therefore, the appellants – accused Nos. 1 & 2

committed the offence under Section 304 Part-1 read with Section 34 of the IPC. He has further submitted that the learned Principal Sessions Judge, Mehsana has further failed to prove beyond reasonable doubt that the accused Nos. 1 & 2 were voluntarily causing simple hurt and grievous hurt by dangerous weapons i.e. Knife to the prosecution witnesses Bhikhabhai Malabhai Rabari, Babubhai Malabhai Rabari, Dharamshi Khodabhai Rabari, Vishnubhai Amratbhai Rabari, Mahendraji Nathaji Thakore on the vital parts of the body on 12.08.2004 at Kansara Kui village at 7.30 p.m. with the intention of causing death, or of causing such bodily injury as was likely to cause the death of the deceased and, therefore, the accused Nos. 1 & 2 have committed the offence under Sections 324, 326 read with Section 34 of the IPC. The learned Principal Sessions Judge, Mehsana has failed to appreciate that the accused No.1 had also filed complaint in respect of the said incident, being I C.R. No. 304 of 2004 on 23.08.2004 registered with the Visnagar Police Station for the offences punishable under Sections 324 & 114 of IPC against the four accused who are the prosecution witnesses in the present case. After conclusion of the investigation, the

Investigation Officer has filed charge-sheet against the four accused and thereafter the learned Principal Sessions Judge, Mehsana had passed an order for consolidation of this case along with the present case. The said case was registered as Sessions Case No. 25 of 2005. After conclusion of the trial, the learned Principal Sessions Judge, Mehsana has passed an order on 10.06.2005 convicting the accused No. 1 therein for the offence punishable under Section 323 of IPC with R.I. of one year and fine of Rs.10,000/- and in default, further simple imprisonment for two months.

13. Mr. Shah has further submitted that the learned Principal Sessions Judge, Mehsana has not taken into consideration the real facts of the case. The appellants were residing at Gadha village and doing the agricultural activities. On 12.08.2004, the accused No.1 had gone to Gadha village from Mehsana at about 4.30 p.m. and at that time, wife of the accused No. 1, namely, Kantaben had made a complaint to the accused No. 1 that the Rabaris of Kansara Kui village had come with their 30 to 35 cows for grazing in the wasteland and the wife of the accused No. 1 had also given rebuke to them and,

therefore, the Rabaris had asked the wife of the accused No.1 to send her husband to Kansara Kui village in the evening time. The accused Nos. 1 & 2 along with other five to six persons had gone to Kansara Kui village in a Jeep and they stopped the Jeep near the Rabari Vas in Kansara Kui village. The accused No. 1 had gone to the house of Rabari Amratbhai Malabhai and started to give rebuke to the said Amratbhai Rabari about the said mischief and asked him to come and see the said Bhelan in the wasteland. The quarrel took place thereafter between the two groups and there were exchange of hot words and thereafter the said Amratbhai Malabhai Rabari had inflicted stick blow on the head of the accused No. 1 and thereafter other Rabaris had rushed to the spot with Lathis in their hand and therefore, the accused No.1 and other persons felt that the Rabaris will kill them and as such, they ran away from the spot leaving their Jeep in an abandoned condition. Due to the injuries caused on the head of the accused No.1, he was admitted in Civil Hospital, Mehsana and thereafter he was shifted to the Hospital of Dr. Mahesh Trivedi, Neurosurgeon and admitted as an indoor patient.

14. Mr. Shah has further submitted that in the deposition of P.W. 5 – Dharmashi Khodabhai Rabari at Exh. 39, he has categorically deposed in his cross-examination that the persons in the party of accused were much less in number than the persons of the other side i.e. Rabaris. The witness has also deposed that the people of the said Kansara Kui village had tried to catch hold of the accused persons, but they could not catch the accused persons. This witness has also deposed that the said incident took place in the open place of the Rabari Vas. This witness has also deposed that the Rabaris removed air from the tyres of the jeep and broke the glass of the jeep. P.W. 1 – Dr. Prakashkumar P. Patwa at Exh. 22 has categorically deposed in the cross-examination and agreed on the question asked by the Court that if a person is cordoned by 4-5 persons and he wielded the knife surrounding his body for saving himself and if any person comes in the contact of the knife then these persons can receive the injuries like the injuries received by the injured persons in the present case. Rabari Mohalla is situated much interior from the main road and, therefore also, except the Rabaris nobody were there or could reach there. There is no substance in the

finding of the learned Principal Sessions Judge, Mehsana saying that the accused Nos. 1 & 2 have caused knife injuries to the injured persons and the deceased while exercising the right of private defence, the accused Nos. 1 & 2 have used excess powers and thereby they have committed the offence.

15. Mr. Shah has further submitted that the learned Principal Sessions Judge, Mehsana has not correctly appreciated that basic idea under Section 100 of the IPC which states that no innocent person should be convicted. If a person has committed an offence in defending his person or property instead of running away from the spot, the law has given him a right to defend his person or property or any one, in whom he is interested, even though the danger to his life is facing him and if he acts bravely in warding off that apprehension instead of running away from the place of incident, the law presumes that he will not be held responsible for such an offence and, therefore, it is held by the Court that such a person will be deemed to be an innocent person. In the present case, it is a free fight between the two groups and it has come on record that

the prosecution witnesses' side was in aggressive mood and the said Amratbhai Malabhai Rabari had attacked on the accused No. 1 with a stick on the head and in such a situation, the accused had a reasonable apprehension of his death and hence the accused is entitled to the right of self defence and, therefore, the accused Nos. 1 & 2 should be acquitted.

16. Mr. Shah has further submitted that the learned Principal Sessions Judge, Mehsana has not correctly appreciated that there was a free fight between the two groups i.e. the prosecution party and the accused party, in which both the parties sustained injuries. It is a settled law that in a free fight each accused will be liable for the individual act attributed to the particular accused and he would be entitled to acquittal on plea of exercise of right of private defence. Where the accused received injuries during the same occurrence in which the complainants were injured and they have taken the plea that they acted in self-defence, that cannot be lightly ignored and the accused persons would be entitled to acquittal.

17. In support of his submission, Mr. Shah has relied on the decision of the Hon'ble Supreme Court in the case of **Puram V/s. State of Rajasthan, AIR 1976 SUPREME COURT 912** wherein it is held that in a case of sudden mutual fight between the two parties, there can be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on an accused. The accused in such a case can be convicted only for the injuries caused by him by his individual acts.

18. Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of **Hari Kishan and State of Haryana V/s. Sukhbir and others, AIR 1988 SUPREME COURT 2127** wherein, after finding itself in agreement with the observations made by the High Court that there was no previous history of enmity between the parties and the occurrence is the outcome of a sudden flare up, the Hon'ble Supreme Court has observed that the accused had no intention to commit murder of any person and hence, the extension of benefit of the beneficial legislation i.e. Probation of Offenders Act, applicable to first offender cannot be said to be inappropriate.

19.Mr. Shah has further submitted that the learned Principal Sessions Judge, Mehsana has awarded the compensation of Rs.5 Lacs to the widow of the deceased and his children. The learned Principal Sessions Judge, Mehsana has not correctly appreciated the scheme of Section 357 of the Code. An order to pay compensation can be made when a Court imposes a sentence of fine or a sentence (including sentence of death) of which fine forms a part and while passing judgment, the Court can order the whole or any part of the fine recovered, inter alia to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such persons in a Civil Court. In Sub-section (3) of Section 357 of the Code, it is provided that when a Court imposes a sentence, of which fine does not form a part, the Court may, when passing the judgment, order the accused persons to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reasons of the act for which the accused person has been so sentenced. It is not as if the amount which is

ordered to be paid by way of compensation, is out of any fine imposed. Therefore, the direction of the learned Principal Sessions Judge, Mehsana on the accused persons that over and above undergoing the sentence as said above and paying the fine as ordered, they should also pay compensation, is not justified by the provisions of Section 357 of the code.

20. In support of his submission, Mr. Shah relied on the decision of the Hon'ble Supreme Court in the case of **Sivasuriyan V/s. Thangavelu, (2004) 13 Supreme Court Cases 795** wherein while considering the question as to whether the Court can direct payment of compensation in exercise of power under Sub-section (3) of Section 357 in a case where fine already forms part of the sentence, the Hon'ble Supreme Court has observed that on a plain reading of Section 357 (3) of Cr.P.C., it is crystal clear that the power can be exercised only when the Court imposes sentence by which fine does not form a part. Once the Court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357 could not have been exercised.

21. Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of **Mangilal V/s. State of Madhya Pradesh, AIR 2004 SUPREME COURT 1280** wherein it is held that Section 357 (1) deals with a situation when a Court imposes a fine or a sentence (including sentence of death) of which fine also forms a part. It confers a discretion on the Court to order as to how the whole or any part of fine recovered is to be applied. For bringing in application of sub-section (1) of Section 357 it is a statutory requirement that fine is imposed and thereupon make further orders as to the disbursement of the said fine in the manner envisaged therein. If no fine is imposed, S. 357 (1) has no application. Sub-section (3) on the other hand deals with the situation where fine does not form part of the sentence imposed by a Court. In such a case, the Court when passing a judgment can order the accused persons to pay by way of compensation such amount as may be specified in the order to the person who has suffered a loss or injury by reason of the act of which the accused person has been so convicted and sentenced. The basic difference between the sub-sections (1) and (3) is that in the former case, the imposition of fine is the basic and

essential requirement, while in the latter even in the absence thereof empowers the Court to direct payment of compensation. Such power is available to be exercised by a appellate Court or by the High Court or Court of Session when exercising revisional powers. The power of the Court to award compensation to victims under Section 357 is not ancillary to other sentences but is in addition thereto.

22. Mr. Shah has also invited our attention to certain findings arrived at and conclusion drawn by the learned Principal Sessions Judge, Mehsana. He has pointed out the following findings arrived at by the learned Principal Sessions Judge :-

A) Accused Nos. 3,4 & 5 acquitted of all the charges.

B) The bloodstains found at different places clearly suggest different individuals receiving injuries at different places and this can happen only when there is free fight.

C) The accused have first contacted the complainant and discussed about straying of cattle in the fields at village

Gadha and the hot discussion resulting into enragement and exchange of blows. This exchange of words between complainant and accused resulted into gathering of Rabaris from nearby and assaulted the accused. It appears that, with a view to make their escape good, the accused appears to have taken out knife and during grappling at the time of making wave from escaping injuries appeared to have been inflicted. That there were more Rabaris present at the place of offence than the number of accused.

D) When the accused were encircled by Rabaris, the wielding of knife by accused appears to be quite reasonable and the fact that accused had to leave their jeep car in the Rabari Vas also justify the action of the accused.

E) Considering the conduct of the accused, it clearly transpires that they had come only for the talk of straying of cattles in the fields and there was no intention of assaulting and beating.

F) On overall facts and circumstances, no specific evidence

has come on record to show that accused had intended to beat any one or to commit murder of Motibhai Odharbhai.

G) Considering the evidence of prosecution witnesses, it does not transpire that the accused had intentionally caused injuries to particular person and more particularly with intention to kill by knives.

H) The accused No. 1 is alleged to have caused injuries to 5 injured witnesses including the deceased, whereas accused No. 2 is alleged to have caused injuries to Rabari Bhikhabhai Malabhai. The said injury is a simple injury punishable under Section 324.

I) The accused while trying to defend themselves had wielded knife and caused injury to the witnesses, and in that defence cannot be ruled out.

23. After pointing out the aforesaid findings, Mr. Shah has also pointed out the following conclusions drawn by the learned Principal Sessions Judge, Mehsana :-

(a) Accused No. 1 committed offence punishable under Section 304 (Part-I).

(b) The accused No. 2 caused injury to Rabari Bhikhaji Malajibhai and committed offence punishable under Section 324.

(c) However, the learned Principal Sessions Judge, Mehsana also recorded finding that prosecution evidence disclosed that accused No. 1 was wielding knife in his self defence but in exercising the right of self defence, the accused No. 1 has used more force than the force required to be used.

24. On the basis of the aforesaid findings and submissions made by him, Mr. Shah has strongly urged that there is no case against the accused No. 1 to convict him under Section 304 Part-I of IPC. At the most, the case would fall under Section 304 Part-II and sentence undergone by the accused No. 1 is sufficient to meet with the ends of justice. As far as accused No. 2 is concerned, no case is made out against him either under Section 304 Part-I & Part-II or Section 326 and since there is only one single

blow, the accused No. 2 can at the most be convicted under Section 324 of IPC and since he has also undergone a sentence of about more than one year, he is required to be released forthwith and appeal may be decided accordingly. He has further submitted that compensation of Rs.5 Lac awarded by the learned Principal Sessions Judge, Mehsana is absolutely illegal in view of the fact that he has already imposed fine. He has, however, no objection if the suitable amount is awarded by way of compensation after deleting the fine imposed by the learned Principal Sessions Judge.

25. Mr. K. T. Dave, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat, on the other hand, has supported the judgment and order of the learned Principal Sessions Judge, Mehsana. He has submitted that the prosecution has proved beyond reasonable doubt that the accused Nos. 1 & 2 have committed offence under Section 304 (1) of IPC and, therefore, the learned Principal Sessions Judge, has rightly punished the accused Nos. 1 & 2. The learned Principal Sessions Judge, Mehsana has passed the impugned judgment and order after proper and careful

appreciation of oral as well as documentary evidence and hence, no interference is called for while deciding this appeal under Section 374 of the Code.

26. We have considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. We have undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case.

27. After thread-bare examination of the evidence of the prosecution witnesses, on reappreciation, reanalysis, reevaluation and close scrutiny of the evidence, we are of the view that there is no discussion on the aspect of common intention at all in the entire judgment. The learned Principal Sessions Judge came to the conclusion that there was no unlawful assembly having any common object. Similarly, the finding that accused No.1 inflicted injuries while exercising right of self defence and in that exercise of right of self defence, exceeded the same.

Thus, when accused is exercising right of private defence, it cannot be said that the infliction of injuries was in furtherance of common intention. Further, the finding that the incident had taken place all of a sudden in exchange of words on account of discussion as to straying of cattles in the field and other Rabaris gathering and assaulting accused clearly nullify the accused acting in furtherance of common intention.

28. Medical evidence about injuries sustained by deceased Motibhai Odharbhai Rabari clearly disclosed that there was stab incise wound on right chest, just medial to right auxillary lower part. Vertical and slightly oblique and 3 cm away nipple, laterally 4 cm X 1.5 cm X Clean Edge X both angle acute X bleeding present X Cavity Deep. The patient gave the history of Chhari by Popatbhai Chaudhary (Exh. 27). The P.M. Report reveals stitch wound right side Chest medial to right lower auxillary region and 3 Cm., away from nipple lateral, vertical and slightly oblique. Length of the stitched wound – 4 Cm on removing stitch, length 4 cm and edges clean, both angle acute and on passing rubber catheter, goes deep into Thorasic cavity, i.e., stab incise wound.

29. Thus, there is only one blow sustained by deceased Motibhai Odharbhai. It also clearly transpires from the evidence on record that accused had gone to Amratbhai Malabhai and questioned about straying of cattle in Kharaba at village Ghada and there was exchange of word during which complainant went inside his house to bring the stick. Thus, when complainant came out, other Rabaris had already collected and accused No. 1 inflicted injuries on others. Thus, there was no motive or intention on part of accused No. 1 to inflict injury on Motibhai Odharbhai. Thus, considering the finding of the learned Principal Sessions Judge, Mehsana as to accused No. 1 wielding knife in exercise of his right of self defence, it cannot be said that infliction of one blow under these circumstances to Motibhai Odharbhai can be considered as exceeding right of private defence.

30. Similarly, medical evidence as to other witnesses clearly reflect the nature of assault and nature of injuries;

(1) *Injuries to Babubhai Malabhai* :-

(a) Incise wound left side abdomen 5 cm lateral to

Umbilicus 1 cm X 1 cm x oblique in direction. Muscle deep bleeding present.

(b) Abrasion left side Chest below nipple, 3 cm X 1/4 cm oblique (Exh. 23 – Page 126).

(2) *Injuries to Bhikhabhai Malabhai* :-

Incise wound left lower anterior chest at anterior auxillary line, 2 cm X 1 cm X up-down direction, bleeding present (Exh. 24 – Page 127).

(3) *Injuries to Dharamsinhbhai Khodabhai* :-

Incise wound left anterior Chest at anterior auxillary line, 1 cm X 1.5 cm X up-down direction X muscle deep bleeding present 2 Cm below at nipple level (Exh. 25 – Page 128).

(4) *Injuries to Vishbhai Amratbhai* :-

Incise wound right chest just lateral to epigastric region, 3.5 cm X 1.5 cm. By muscle deep bleeding present (Exh. 26 – Page 129).

(5) *Injuries to Mahinderji Nathaji* :-

Stab incise wound left side abdomen lower part, 6 cm below Umbilicus and just lateral to midline 2 cm X 1.5 cm X Peritonial cavity deep X Omentum seen outside (Page 131).

31. All these certificates clearly establish that the injured sustained only one injury including the deceased. Furthermore, all these injuries are near Chest and Abdomen which clearly justify the theory of wielding of knife by accused No.1 to save himself when both brothers were surrounded by Rabaris.

32. Furthermore, the damage to jeep car clearly establish that during exchange of words, the Rabaris had collected with different weapons and had also assaulted accused No.1 with stick on head and as escape by vehicle being not possible had to run from that place. Thus, prima facie, accused No.1 has wielded knife, while making his escape good from the place through the group of Rabaris who had encircled the accused and jeep car whereby Rabaris sustained injuries.

33. The accused sustained contuse lacerated wound on left

parietal region of Scalp, oblique X 7 cm X 1.5 cm X Bone Deep and bleeding present. Thus, damage to the jeep car as well as infliction of injury on accused No.1 and accused Nos. 1 and 2 both making their escape good after being encircled by Rabaris and injured sustaining only one injury during the course of escaping from the place by accused clearly rules out the possibility of exceeding right of self defence. The accused, under these circumstances, cannot be expected to weigh in Golden Scale and inflict injury. The accused has not inflicted any injury on injured persons except one injury. Thus, considering the finding of the learned Principal Sessions Judge, Mehsana that the accused No.1 inflicted injuries in exercise of right of private defence, but had exceeded the same, is not justifiable.

34. For the foregoing reasons, the conviction of accused No.1 is altered from Section 304 (Part-I) with Section 34 to Section 304 (Part-II). While upholding the conviction under Section 304 (Part-II), the sentence is altered by reducing the same to R.I. of 2 and half years and no fine is imposed in view of the compensation of Rs. 3 Lacs awarded to the legal heirs i.e. wife and two minor

children of the deceased. As far as conviction under Section 326 with Section 34 of IPC is concerned, the same is upheld only under Section 326. However, the sentence is reduced to 2 years of R.I. with fine of Rs.1,000/- and in default thereof, to undergo S.I. of two months. As far as conviction under Section 324 with Section 34 of IPC is concerned, the same is upheld only under Section 324. However, the sentence is reduced to one year and there is no fine in view of the above compensation. All substantive sentences are ordered to run concurrently.

35. So far as accused No. 2 is concerned, as discussed above, no case is made out against him for an offence punishable under Section 304 (Part-I) and Section 326 with Section 34 of IPC. The accused No. 2 is, therefore, acquitted from the charge of offence levelled against him under Section 304 (Part-I) and 326 with Section 34 of IPC. Since the accused No. 2 has inflicted a knife blow on one of the injured witnesses and that injury was of minor nature as per the medical evidence, the accused No. 2 is convicted under Section 324 only and not under Section 324 with Section 34 of IPC and he is sentenced

for R.I. of one year with fine of Rs.1,000/- and in default thereof, to undergo S.I. Of 15 days.

36. However, looking to the facts of the case and age of the heirs of the deceased i.e. wife and two minor children, the Court thinks it fit and proper to award compensation of Rs.3 Lacs under Section 357 (3) of Cr.P.C. On deposit of the amount of Rs.3 Lacs, the accused No.1 and 2 be ordered to be released from the jail forthwith, if their presence is not required in connection with any other case. After deposit of the amount of Rs.3 Lacs before the Trial Court, the learned Principal Sessions Judge, Mehsana is hereby directed to invest this amount in the long term deposit in three separate Fixed Deposits of Rs.1 Lac each with any Nationalised Bank initially for the period of five years in the name of (1) Rabari Kaliben Motibhai – wife of the deceased, (2) Rabari Tejalben Motibhai – daughter of the deceased - jointly with Rabari Kaliben Motibhai being guardian and mother of Tejalben and (3) Rabari Ronakbhai Motibhai – son of the deceased – jointly with Rabari Kaliben Motibhai - being guardian and mother of Ronakbhai. Each deposit would be of Rs. 1 Lacs. On expiry of the term of five years, the

fixed deposit standing in the name of two minors shall get renewed till they attain majority. It is made clear that Rabari Kaliben Motibhai – wife of the deceased will not get any loan or advance against these Fixed Deposit Receipts. The persons in whose name the deposits are issued shall be entitled to utilise the interest.

37. Subject to the aforesaid directions and observations, this appeal is accordingly partly allowed. The respondent – State of Gujarat and jail authorities are hereby directed to release the appellants-accused Nos. 1 & 2 on fulfillment of the above condition and if their presence is not required in connection with any other case. Amount of fine, if paid in excess of above shall be refunded to the appellants-accused Nos. 1 & 2 forthwith.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya